RIH Services (M) Sdn Bhd v Tanjung Tuan Hotel Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-24 OF 2002

ABDUL HAMID MOHAMAD, MOHD SAARI AND MOHD NOOR AHMAD JJCA

13 MAY 2002

Civil Procedure *— Injunction — Ex parte injunction — Lapse — Calculation of 21 days from date injunction was granted — Whether lapsed ex parte injunction could be extended — Whether High Court judge correct in setting aside ex parte injunction upon expiry even when ex parte application had not been heard and no decision given — Whether defendant automatically entitled to damages when ex parte order lapsed — Rules of the High Court 1980 O 3 r 2(2) & O 29 r 1(2B) — Interpretation Acts 1948 and 1967 s 54(1)(a)*

On 6 December 2001, the appellant filed an application for an ex parte injunction against the respondent, which was granted by the court. The learned judge also fixed the inter partes hearing on 24 December 2001. On 24 December 2001, the inter partes hearing was adjourned to 26 December 2001. On 26 December 2001, the appellant, sought an adjournment because he had only been served with an affidavit by the respondent that very same morning and suggested that the inter partes hearing be fixed in the first week of January 2002. The appellant also prayed that in the interim period, the ex parte injunction that was granted on 6 December 2001 be extended. The learned judge held that he was 'constrained to follow' the case of *Cheah Cheng Lan v Heng Yea Lee* [2001] 1 MLJ 433. Consequently, the learned judge made, inter alia, the following orders: (i) set aside the ex parte interim injunction that was granted on 6 December 2001; (ii) ordered that the appellant make good its undertaking as to damages to the respondent; and (iii) refused to extend the ex parte interim injunction that had automatically lapsed by 26 December 2001, which the plaintiff orally requested to be extended until the hearing of the inter partes. The appellant appealed to this court.

Held:

(1) Order 29 r 1(2B) of the Rules of the High Court 1980 ('the RHC') mentioned about 'at the end of 21 days from the date on which it is granted'. Both O 3 r 2(2) of the RHC and s 54(1)(a) of the Interpretation Acts 1948 and 1967 required that the day the order was made to be excluded in reckoning the 21 days. So, the ex parte injunction granted on 6 December 2001 expired on 27 December 2001. The day the order was made should be excluded in computing the 21 days (see p 6F–H).

(2) An ex parte injunction could not be extended beyond the 21 days. The order automatically lapsed after 21 days (see p 7A); *Cheah*

Cheng Lan v Heng Yea Lee [2001] 1 MLJ 433 followed. However, an ex parte application, which for some reason could not be heard or was heard but no decision was given within 21 days from its filing, did not expire after 21 days from its filing. It would still subsist until it was heard and decided upon, even well after 21 days of its filing. The learned judge clearly had the jurisdiction to consider whether or not to grant an ad interim injunction pending the hearing inter partes of the application (see p 7E, H).

(3) The ad interim injunction was not an extension of the ex parte order which expired after 21 days. It was a fresh order made on the converted inter partes application currently before the court. And, when the court finally heard the application, inter partes, the court would then decide whether or not to grant an injunction, inter partes. That would be a fresh order again (see p 8G).

(4) In this case, the learned judge, having found that the ex parte order would expire on 26 December 2001 and, the application could not be heard inter partes before the expiry of the 21 days, proceeded to set aside the ex parte order of 6 December 2001. It was wrong for the learned judge to do so (see p 9B–C).

(5) The learned judge also made an order that the appellant made good its undertaking as to damages. Such an order should not have been made. The fact that an ex parte order lapsed automatically after 21 days did not mean that the defendant was automatically entitled to damages (see p 9D–E).

[Bahasa Malaysia summary

Pada 6 Disember 2001, perayu telah memfailkan satu permohonan untuk satu injunksi ex parte terhadap responden, yang telah dibenarkan oleh mahkamah. Hakim yang arif juga telah menetapkan tarikh perbicaraan inter partes pada 24 Disember 2001. Pada 24 Disember 2001, perbicaraan inter partes tersebut telah ditangguhkan kepada 26 Disember 2001. Pada 26 Disember 2001, perayu telah memohon satu penangguhan kerana beliau hanya telah disampaikan dengan satu afidavit oleh responden pada pagi yang sama dan mencadangkan agar perbicaraan inter partes tersebut ditetapkan pada minggu pertama Januari 2002. Perayu juga memohon agar dalam tempoh interim, injunksi ex parte yang telah diberikan pada 6 Disember 2001 dilanjutkan. Hakim yang arif telah memutuskan bahawa beliau 'terpaksa mengikut' kes *Cheah Cheng Lan v Heng Yea Lee* [2001] 1 MLJ 433. Akibatnya, hakim yang arif telah memutuskan, antara lain, perintah-perintah berikut: (i) mengetepikan injunksi interim ex parte yang telah diberikan pada 6 Disember 2001; (ii) perintah bahawa perayu menunaikan akujanjinya berkaitan ganti rugi kepada responden; dan (iii) enggan untuk melanjutkan injunksi interim ex parte yang serta-merta luput pada 26 Disember 2001, yang plaintif telah pohon secara lisan untuk dilanjutkan sehingga perbicaraan inter partes tersebut. Perayu merayu ke mahkamah ini.

Diputuskan:

(1) Aturan 29 k 1(2B) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') berbincang tentang 'at the end 21 days from the date on which it is granted'. Kedua-dua A 3 k 2(2) KMT dan s 54(1)(a) Akta Tafsiran 1948 dan 1967 menghendaki hari perintah dibuat dikecualikan dalam mengira tempoh 21 hari. Oleh itu, injunksi ex parte yang diberikan pada 6 Disember 2001 telah luput pada 27 Disember 2001. Hari perintah tersebut dibuat sepatutnya dikecualikan dalam mengira 21 hari (lihat ms 6F–H).

(2) Satu injunksi ex parte tidak boleh dilanjutkan melebihi 21 hari. Perintah tersebut dengan serta-merta luput selepas 21 hari (lihat ms 7A); *Cheah Cheng Lan v Heng Yea Lee* [2001] 1 MLJ 433 diikut. Namun begitu, satu permohonan ex parte, yang oleh kerana suatu sebab tidak boleh didengar atau sedang didengar tetapi tiada keputusan diberikan dalam tempoh 21 hari daripada pemfailannya, tidak luput selepas 21 hari daripada pemfailannya. Ia masih kekal sehingga ia didengar dan diputuskan, walaupun melebihi 21 hari daripada pemfailannya. Hakim yang arif jelas mempunyai bidang kuasa untuk mempertimbangkan sama ada atau tidak memberikan satu injunksi ad interim sementara menunggu permohonan inter partes tersebut (lihat ms 7E, H).

(3) Satu injunksi ad interim bukan satu lanjutan perintah ex parte yang luput selepas 21 hari. Ia adalah satu perintah baru yang dibuat ke atas permohonan inter partes yang sekarang di hadapan mahkamah. Dan, apabila mahkamah akhirnya mendengar permohonan tersebut, secara inter partes, mahkamah akan memutuskan sama ada atau tidak untuk memberikan satu injunksi, secara inter partes. Ia akan merupakan satu perintah yang baru juga (lihat ms 8G).

(4) Dalam kes ini, hakim yang arif, setelah mendapati bahawa perintah ex parte akan luput pada 26 Disember 2001 dan, permohonan tersebut tidak boleh didengar inter partes sebelum luputnya 21 hari tersebut, telah mengetepikan perintah ex parte 6 Disember 2001 tersebut. Mahkamah berpandangan adalah salah untuk hakim yang arif berbuat demikian (lihat ms 9B–C).

(5) Hakim yang arif juga telah membuat satu perintah bahawa perayu menunaikan akujanjinya berhubung ganti rugi. Perintah sedemikian tidak sepatutnya dibuat. Hakikat bahawa satu perintah ex parte telah luput serta-merta selepas 21 hari tidak bermaksud defendan dengan serta-merta layak mendapat ganti rugi (lihat ms 9D–E).]

Notes

For cases on ex parte injunction, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2507–2543.

Cases referred to

Beese & Ors (Managers of Kimpton Church of England Primary School) & Ors v Woodhouse & Ors [1970] 1 All ER 769 (refd)

Cheah Cheng Lan v Heng Yea Lee [2001] 1 MLJ 433 (folld)

Jagjit Singh Khanna v Dr Rakhul Pas Mullick & Anor AIR 1988 Cal 9 (refd)

Jakob Renner (an infant suing through his father and next friend, Gilbert Renner) & Ors v Scott King, Chairman of the Board of Directors of the International School of Kuala Lumpur & Ors [2000] 5 MLJ 254 (refd)

Sam Peng Thong & Ors v Tetap Meriah Sdn Bhd [2002] 1 CLJ 105 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25
Interpretation Acts 1948 and 1967 s 54
Rules of the High Court 1980 O 3 r 2(2), O 29 r 1(2B), O 92 r 4

CV Dass (*K Mohan* and *K Prakash* with him) (*Shook Lin & Bok*) for the appellant.

Yogesswary Singam (*Zainal Abidin & Co*) for the respondent.

Abdul Hamid Mohamad JCA (delivering judgment of the court): The appellant (the plaintiff in the High Court) is the company that manages the Regency Hotel and Resort at Port Dickson, belonging to the respondent (the defendant in the High Court). A management agreement was entered by the parties on 15 September 1991. It was to last for ten years. The appellant would be paid 5% of the total annual revenue. Under the agreement, the appellant was to have an uninterrupted control and operation of the hotel and the respondent agreed not to interfere with the day to day running of the hotel.

On 5 December 2001, the appellant filed a suit (S5–22–1254 of 2001) from which this appeal arises. In the suit, the appellant alleges that the respondent had failed and/or neglected to pay the appellant its management fees from October 1995 amounting to RM348,582.43 as at 31 December 1996. The appellant also alleges that the respondent had wrongfully and unlawfully terminated the management agreement. There is also another suit filed in Kuala Lumpur High Court No D2–22–67 of 1996 between the parties which is still pending.

On 6 December 2001, the appellant filed an ex parte summons in chambers praying for the following orders:

1 the defendant whether by its agents, servants, officers or howsoever, be restrained from interfering with or obstructing or hampering the plaintiffs continued management and operation of the Regency Hotel and Resort, Port Dickson ('the Hotel');

2 the defendant within two days of service of this order, whether by its agents, servants, officers or howsoever, including by way of signing cheques or issuing instructions, do all things as may be necessary to pay,

A authorize, or ensure payment of wages, allowances or contractual dues owing to or arising in respect of all persons working at the Hotel for the period of November 2001 as specified in Sch A herein out of the funds generated by the operations of the Hotel including funds in Bumiputra Commerce Bank Account No 05080007490051 and Standard Chartered Bank Account No 836144611102 ('the accounts'), and for subsequent months to pay, authorize or ensure payment from the funds as aforesaid in accordance with such lists of staff or employees as may be submitted by the plaintiff to the defendant within seven days of receipt of such submission;

3 the defendant within two days of service of this order, whether by agents, servants, officers or howsoever, do all things as may be necessary to pay, authorize or ensure payment of outstanding amounts due to suppliers and creditors as specified in Sch B herein, out of the funds generated by the operations of the Hotel including funds in the accounts and to hereafter pay, authorize or ensure payment from the funds as aforesaid in accordance with such lists of creditors and suppliers as may be periodically submitted to the defendant by the plaintiff within seven days of receipt of such submission;

4 the parties be at liberty to apply;

5 a date to be fixed for the inter partes hearing of this application;

6 that provision may be made for the costs of this application; and

7 such further or other relief which this honourable court deems fit.

The learned judge heard the application (encl 4) on 6 December 2001 and granted prayers (1), (2), (3) and (4). The learned judge also fixed the inter partes hearing on 24 December 2001.

On 24 December 2001, the inter partes hearing of encl 4 was adjourned to 26 December 2001.

On 26 December 2001, learned counsel for the appellant, sought an adjournment because he had only been served with an affidavit by the respondent that very same morning and suggested that the inter partes hearing be fixed in the first week of January 2002. The learned counsel also prayed that in the interim period, the ex parte injunction that was granted on 6 December 2001 be extended. There was an argument whether the ex parte order would expire on 26 December 2001 or 27 December 2001. That depends on when the computation of the 21 days is to begin, that is, whether the day the order was made is to be included or not. The learned judge held that the day the order was made must be counted and that the 21 days expire on 26 December 2001.

On the power to extend the ex parte order, the learned judge held that he was 'constrained to follow' *Cheah Cheng Lan v Heng Yea Lee* [2001] 1 MLJ 433. This is what the learned judge says:

> With a heavy heart, I was constrained to follow *Cheah Cheng Lan* even though that decision was decided per incurium and even though that decision greatly eroded the inherent powers of the court 'to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court' as set out in O 92 r 4 of the Rules of the High Court 1980. The doctrine of stare decisis compelled me to follow *Cheah Cheng Lan* blindly.

Consequently, the learned judge made the following orders: A

(1) set aside the ex parte interim injunction that was granted on 6 December 2001;

(2) order that the plaintiff make good its undertaking as to damages to the defendant, and here the defendant has to file a formal application to support its application for that prayer; B

(3) refuse to extend the ex parte interim injunction that has automatically lapsed by today (26 December 2001) which the plaintiff orally requested to be extended until the hearing of the inter partes; and

(4) costs to the defendant.

Before us, even though it is not essential for the determination of the appeal, we were asked to decide on the issue whether, in the computation of the 21 day life span of an ex parte injunction under O 29 r 1(2B) of the Rules of the High Court 1980 ('the RHC'), the day the order is made should be counted or not. C

Order 29 r 1(2B) of the RHC reads: D

> Unless sooner revoked or set aside, an interim injunction obtained on an ex parte application shall automatically lapse at the end of 21 days from the date on which it is granted.

Order 3 r 2(2) of the RHC provides:

> Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date. E

Order 54 of the Interpretation Acts 1948 and 1967 (Act 388) provides:

(1) In computing time for the purpose of any written law —

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing done ... F

The learned judge in this case had counted 6 December 2001, the day the injunction order was made in computing the 21 days. Our attention was drawn to the judgment of Syed Ahmad Helmy JC in *Sam Peng Thong & Ors v Tetap Meriah Sdn Bhd* [2002] 1 CLJ 105, in which the learned judicial commissioner excluded the day the order was made in computing the 21 days. G

In our judgment, the view taken by Syed Ahmad Helmy JC is the correct view. It should be noted that O 29 r 1(2B) of the RHC talks about 'at the end of 21 days from the date on which it is granted'. Both O 3 r 2(2) of the RHC and s 54(1)(a) of the Interpretation Acts 1948 and 1967 require that the day the order is made to be excluded in reckoning the 21 days. So, the ex parte injunction granted on 6 December 2001 expired on 27 December 2001. H

The next question to be answered is whether an ex parte injunction can be extended beyond the 21 days. The answer has clearly been given by this Court in *Cheah Cheng Lan*. We have no reason to disagree with it, even if we can. We are of the view that that case was correctly decided, and all that I

it decided is that an ex parte injunction cannot be extended beyond the 21 days. The order automatically lapses after 21 days. It is the ex parte order that lapses, not the application, which upon service, is, by law, converted to an inter partes application. The application, now inter partes, subsists.

Previously, there was no provision as the present O 29 r 1(2BA) of the RHC. So, upon the order being made on the ex parte application, the application can logically be said to have been exhausted. Now, the rule provides that the same ex parte application be served on the relevant party within one week and the court is required to fix a date for inter partes hearing to be held before the expiry of the 21 days. What it means is that, upon it being served, its character changes to one of inter partes. True that a date of hearing inter partes must be fixed before the expiry of the 21 days. The purpose is to require the parties (now the parties, not just the applicant) to appear before the judge before the ex parte injunction expires. Of course, if the parties are ready, the court may hear and may decide whether to grant a fresh inter partes injunction or not. The court is not extending the ex parte injunction because it cannot by law be extended. Of course, it may be, for one reason or other, as in this case, that the court is unable to hear the application inter partes. What happens then? The ex parte order expires? Yes. The application, now converted into an inter partes application, also expires? No. The application does not expire, only the ex parte order expires. By analogy, an ex parte application, which for some reason cannot be heard or is heard but no decision is given within 21 days from its filing, does not expire after 21 days from its filing. It is still there until it is heard and decided upon, even well after 21 days of its filing.

So, even though in this case the ex parte injunction expires on 27 December 2001, the application, on 26 December 2001 when the parties appeared before the learned judge, was still in existence, indeed it was still in existence even on the day we heard this appeal.

That being the case, the 'problem' faced by the learned judge who, for good reasons, could not hear the application inter partes on 26 December 2001 actually did not arise. The 'problem' was thought to have arisen because the learned judge thought that not only the ex parte order expired after 21 days, but the application, now inter partes, had also expired. With respect, we think that is not the case.

So, faced with the situation that the learned judge did, ie he could not hear the application inter partes before the expiry of 21 days and the ex parte injunction was expiring, what could he do?

Bear in mind that the application was still before him, alive and pending. He clearly had the jurisdiction to consider whether or not to grant an ad interim injunction pending the hearing inter partes of the application. From my own experience, quite often parties would agree to such an order or the defendant would give an undertaking to maintain the status quo pending the hearing of the application inter partes. But even if they do not agree, the court has the jurisdiction to make such an order.

Such a practice has been adopted in England. In *Beese & Ors (managers of Kimpton Church of England Primary School) & Ors v Woodhouse & Ors* [1970] 1 All ER 769 the plaintiff having filed a writ and the statement of claim, took out a summons for an interim injunction. However, pending the hearing of the application inter partes, the judge granted an injunction, ex parte. The Court of Appeal held that the court below had the jurisdiction to do so. The headnote summarizes the judgment thus:

> Where an application for an injunction cannot be heard by the court through no fault of the plaintiff or defendant, and the judge comes to the conclusion on a prima facie view that irreparable damage may be done to the plaintiff by not preventing the continuance of the alleged nuisance or whatever other wrongdoing it may be by the defendant, he has jurisdiction to grant an ex parte injunction (see pp 771 g, 772 g, and 773 j).

In this country, Low Hop Bing J has also granted an ad interim injunction pending the hearing of an application for an interim injunction which was to be heard inter partes in *Jakob Renner (an infant suing through his father and next friend, Gilbert Renner) & Ors v Scott King, Chairman of the Board of Directors of the International School of Kuala Lumpur & Ors* [2000] 5 MLJ 254. The learned judge relied on a decision of the court in India in *Jagjit Singh Khanna v Dr Rakhul Pas Mullick & Anor* AIR 1988 Cal 9 and said at p 257:

> Applying the principle enunciated in the above case, I am of the view that it is within the jurisdiction of our superior courts to grant an ad interim injunction pending the disposal of an application for interlocutory injunction, such as encl 2 in the instant case. This view is in line with the powers of the High Court under s 25 of the Courts of Judicature Act 1964 and the additional powers under para 6 of the Sch to the same Act which include the power to grant an injunction in any manner whatsoever.

Indeed, as we understand it, it is quite a common practice amongst judges in this country.

That way, the status quo is preserved after the expiry of the ex parte order until the inter parte hearing of the application.

It must be pointed out that the ad interim injunction is not an extension of the ex parte order which expires after 21 days. It is a fresh order made on the converted inter partes application now before the court. And, when the court finally hears the application, inter partes, the court will then decide whether or not to grant an injunction, inter partes. That will be a fresh order again.

It should be added that when the court hears the application, inter partes, the issue is whether the court should or should not grant a fresh injunction, inter partes. The court is not considering whether or not to extend the ex parte order, which cannot be extended beyond 21 days. Neither is the court concerned with the question whether the ex parte order should be set aside or not. Those are not the issues before the court.

However, if the defendant wants to set aside the ex parte order, the defendant is at liberty to file an application for that purpose. It is at the

A hearing of that application that the court should decide whether to set it aside or not, if it has not lapsed. If, in the meantime, the ex parte order has lapsed, the court should nevertheless hear the application, not for the purpose of setting it aside or not, because it has lapsed, but for the purpose of determining whether that ex parte order should or should not have been made in the first place. This is necessary in order to determine whether B damages should be awarded or not.

In this case, the learned judge, having found that the ex parte order would expire on 26 December 2001 and, the application could not be heard inter partes before the expiry of the 21 days, proceeded to set aside the ex parte order of 6 December 2001.

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With respect, we are of the view that it is wrong for the learned judge to do so. First, the order would expire anyway after 21 days. Secondly, the fact that it automatically expires does not mean that it was wrongly granted in the first place that justifies it to be set aside. Thirdly, the fact that the application could not be heard inter partes within 21 days does not mean D that the ex parte order was wrongly given. Fourthly, there was no application to set aside the ex parte order before the court.

The learned judge also made an order that the appellant makes good its undertaking as to damages. Again, with respect, for the same reasons given in the preceding paragraph, such an order should not have been made. The E fact that an ex parte order lapses automatically after 21 days does not mean that the defendant is automatically entitled to damages. The question is should the ex parte order have been made at all? Only if it should not, then the order for assessment of damages should be made. That has not been decided. There was not even an application for that purpose.

F Regarding the order of the learned judge refusing to extend the ex parte interim injunction, we made no order as the question extending it does not arise at all because it cannot be extended anyway.

The learned judge also ordered that costs be paid to respondent. Here again, with respect, we are of the view that it is unfair to penalize the G appellant (plaintiff) with costs as the ex parte order had lapsed and has not been set aside, nor was it found that it should not have been made in the first place. We ordered that costs be in the cause.

Now, as has been said earlier, what had lapsed is the ex parte order, not the application, which has now become an inter partes application. There is H no time limit for it to be heard. It still subsists. So, we directed that the parties appear before the learned judge on 15 April 2002 to get a date of hearing, inter partes, of the application which should be heard as a matter of urgency. In the meantime, we were told that there was an Erinford injunction granted by this court until the day we decide this appeal. In the interest of justice and in the circumstances of this case, we granted an ad I interim injunction on the same terms as the Erinford injunction granted by this court on 28 January 2002 until the disposal of the application by the learned judge.

In the circumstances of this case, we ordered that the costs of this appeal be costs in the cause and that the deposit be refunded to the appellant. A

Order accordingly.

Reported by Peter Ling B

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